

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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COMCAST OF SACRAMENTO I, LLC;
COMCAST OF SACRAMENTO II,
LLC; and COMCAST OF
SACRAMENTO III, LLC;

Plaintiffs,

v.

SACRAMENTO METROPOLITAN CABLE
TELEVISION COMMISSION and
DOES 1 through 20,

Defendant.

CIV. NO. 2:16-cv-1264 WBS EFB

MEMORANDUM AND ORDER RE: MOTION
AND CROSS-MOTION FOR SUMMARY
JUDGMENT

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Plaintiffs Comcast of Sacramento I, Comcast of
Sacramento II, and Comcast of Sacramento III brought this action
against defendant the Sacramento Metropolitan Cable Television
Commission, seeking return of a security deposit provided by
plaintiffs' predecessor-in-interest to defendant some thirty-
three years ago. (Compl. (Docket No. 1).) Plaintiffs now move
for summary judgment against defendant, and defendant cross-moves

1 for summary judgment against plaintiffs. (Pls.' Mot. (Docket No.
2 21); Def.'s Cross-Mot. (Docket No. 22).)

3 I. Factual and Procedural Background¹

4 Plaintiffs are mutually affiliated limited liability
5 companies which provide cable television service in Sacramento
6 County. (See Docket No. 18; Decl. of Lee-Ann Peling ("Peling
7 Decl.") ¶ 2 (Docket No. 21-2); Def.'s Mot., Mem. ("Def.'s Mem.")
8 at 1 n.3, 12 (Docket No. 22-1).) Defendant is a municipal
9 authority which "administer[s] and enforce[es] cable television
10 franchises and licenses" in Sacramento County. (Decl. of Robert
11 Davison ¶ 2 (Docket No. 22-3).)

12 In 1984, plaintiffs' predecessor-in-interest
13 ("predecessor") provided a \$250,000 deposit to defendant as
14 security for its performance of various obligations the county
15 imposed upon it as a cable franchisee. (See Decl. of Jill Rowe
16 ("Rowe Decl.") ¶ 3 (Docket No. 21-3); Def.'s Req. for Judicial
17 Notice Ex. A, Sacramento Cnty. Code § 5.50.702 (Docket No. 22-
18 4).²) In 1992, defendant refunded all but \$100,000 of the
19 deposit to the predecessor after it had satisfied some of those
20 obligations. (Rowe Decl. ¶ 4.) Pursuant to Sacramento County
21 Code section 5.50.702, defendant was to hold the remaining
22 \$100,000 ("security deposit") in an interest-bearing account
23

24 ¹ The facts discussed in this Order are not disputed.

25 ² The court hereby takes judicial notice of the
26 provisions of Sacramento County Code provided with defendant's
27 Cross-Motion (Docket No. 22-4 Ex. A) and plaintiffs' Reply
28 (Docket No. 25-1 Exs. 1-4). See Tollis, Inc. v. Cty. of San
Diego, 505 F.3d 935, 938 n.1 (9th Cir. 2007) ("Municipal
ordinances are proper subjects for judicial notice.").

1 until "termination of the [predecessor's] franchise and
2 satisfaction of any damages . . . which may be due" to defendant,
3 at which time the security deposit and its accrued interest would
4 be returned to the predecessor. (Sacramento Cnty. Code §
5 5.50.702.)

6 After 1992, plaintiffs became successors-in-interest to
7 the predecessor's franchise and the security deposit. (See Rowe
8 Decl. ¶ 4.)

9 In 2006, California passed the Digital Infrastructure
10 and Video Competition Act ("DIVCA"), which divested municipal
11 authorities of all "franchise-granting authority" for "video
12 service[s]" and vested such authority in the California Public
13 Utilities Commission ("CPUC"). Cal. Pub. Util. Code § 5840(a);
14 Cty. of Los Angeles v. Time Warner NY Cable LLC, No. CV-12-06655
15 SJO (JCx), 2013 WL 12126774, at *2 (C.D. Cal. July 3, 2013).
16 Pursuant to DIVCA, plaintiffs switched to a CPUC-issued franchise
17 in 2011. (Davison Decl. ¶ 5.) At that time, the defendant-
18 issued franchise plaintiffs had been operating under terminated
19 by operation of law. (Steiner Decl. ¶ 6.)

20 Following the termination of plaintiffs' franchise with
21 defendant, plaintiffs and defendant became embroiled in a dispute
22 over the amount of fees plaintiffs are required to pay defendant
23 under DIVCA. (See Davison Decl. ¶ 8.) Under DIVCA, plaintiffs
24 are required to pay: (1) an annually determined administrative
25 fee to CPUC ("CPUC fee"), Cal. Pub. Util. Code § 441; (2) a state
26 franchise fee of five percent of gross revenues to defendant
27 ("state franchise fee"), id. § 5840(q)(1); and (3) a public,
28 educational, and government programming fee of one percent of

1 gross revenues to defendant ("PEG fee"), id. § 5870(n). The
2 parties disagree about whether plaintiffs are entitled to deduct
3 their CPUC fee payments from their state franchise fee payments
4 under federal law, and whether payments they collect from their
5 subscribers to pay PEG fees must be included in their gross
6 revenues for purposes of calculating their state franchise fees.

7 On November 10, 2014, plaintiffs sent a letter to
8 defendant demanding return of the security deposit. (Steiner
9 Decl. Ex. 1 at 33-36, Security Deposit Demand.) Contending that
10 plaintiffs underpaid state franchise fees for the 2011 and 2012
11 calendar years by \$334,610, defendant rejected plaintiffs' demand
12 and notified them that it would be keeping the security deposit
13 as a partial set-off against the amount allegedly owed. (Davison
14 Decl. ¶¶ 6, 8.) In March 2015, defendant transferred the
15 security deposit from the interest-bearing account it had been
16 held in to defendant's general account. (See Peling Decl. ¶ 4.)
17 The security deposit, with interest, totaled \$227,639.45 at the
18 time of transfer. (Rowe Decl. ¶ 5.)

19 On June 8, 2016, plaintiffs filed this action.
20 (Compl.) Plaintiffs allege causes of action for conversion and
21 "common count" against defendant, seeking payment of the security
22 deposit, interest the deposit accrued up to the date it was
23 transferred to defendant's general account, and prejudgment
24 interest calculated at seven percent per annum the deposit
25 accrued from the date it was transferred to the date judgment is
26 entered in this case. (Id. at 4; Pls.' Mot., Mem. ("Pls.' Mem.")
27 at 11 (Docket No. 21-1).) According to plaintiffs, the total
28 amount sought as of April 3, 2017 is \$260,818.16. (See Pls.'

1 Mem. at 11.)

2 Plaintiffs now move for summary judgment against
3 defendant. (Pls.' Mot.) Defendant cross-moves for summary
4 judgment against plaintiffs. (Def.'s Cross-Mot.) Defendant
5 bases its Cross-Motion on three affirmative defenses: (1)
6 immunity under California Government Code section 815, (2)
7 expiration of the applicable statute of limitations, and (3)
8 right to set off plaintiffs' security deposit and its accrued
9 interest against state franchise fees allegedly owed by
10 plaintiffs for the 2011 and 2012 calendar years. (See Def.'s
11 Mem. at 4-5, 12.)

12 II. Legal Standard

13 Summary judgment is proper "if the movant shows that
14 there is no genuine dispute as to any material fact and the
15 movant is entitled to judgment as a matter of law." Fed. R. Civ.
16 P. 56(a). A material fact is one that could affect the outcome
17 of the suit, and a genuine issue is one that could permit a
18 reasonable jury to enter a verdict in the non-moving party's
19 favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
20 (1986). "[W]here the operative facts are substantially
21 undisputed, and the heart of the controversy is the legal effect
22 of such facts, such a dispute effectively becomes a question of
23 law that can, quite properly, be decided on summary judgment."
24 Joyce v. Renaissance Design Inc., No. CV 99-07995 LGB (EX), 2000
25 WL 34335721, at *2 (C.D. Cal. May 3, 2000); see also Braxton-
26 Secret v. A.H. Robins Co., 769 F.2d 528, 531 (9th Cir. 1985)
27 ("[W]here the palpable facts are substantially undisputed, [the
28 controverted] issues can become questions of law which may be

properly decided by summary judgment.").

III. Discussion

Defendant focuses exclusively on affirmative defenses in its Cross-Motion. It does not dispute that absent the issues raised in its affirmative defenses, plaintiffs are entitled to the security deposit and its accrued interest under their conversion and "common count" causes of action.

To succeed on a conversion claim under California law, plaintiffs must establish: "(1) [their] ownership or right to possession of the [disputed] property; (2) the defendant's conversion by a wrongful act or disposition of property rights; and (3) damages." Mendoza v. Rast Produce Co., 140 Cal. App. 4th 1395, 1405 (5th Dist. 2006) (quoting Burlesci v. Petersen, 68 Cal. App. 4th 1062, 1066 (1st Dist. 1998)). Here, it is undisputed that plaintiffs' predecessor provided a \$250,000 deposit to defendant and that plaintiffs are successors-in-interest to the remaining portion of that deposit and its accrued interest. (See Rowe Decl. ¶ 3; Davison Decl. ¶ 4.) It is also undisputed that after plaintiffs' franchise with defendant terminated, at which time the security deposit became due to plaintiffs, (see Sacramento Cnty. Code § 5.50.702), defendant transferred the security deposit to its general account, causing monetary loss to plaintiffs. (See Peling Decl. ¶ 4; Davison Decl. ¶ 9.) Thus, plaintiffs have established a facially valid conversion claim in this action.

Plaintiffs state a second cause of action for "common count." "A common count is not a specific cause of action, however; rather, it is a simplified form of pleading normally

1 used to aver the existence of various forms of monetary
2 indebtedness” McBride v. Boughton, 123 Cal. App. 4th
3 379, 394, (1st Dist. 2004) (citing Zumbrun v. Univ. of S.
4 California, 25 Cal. App. 3d 1, 14-15 (2d Dist. 1972)). “When a
5 common count is used as an alternative way of seeking the same
6 recovery demanded in a specific cause of action, and is based on
7 the same facts,” it “must stand or fall with [the specific] cause
8 of action.” Id. (citing Zumbrun, 25 Cal. App. 3d at 14 and
9 Farmers Ins. Exch. v. Zerlin, 53 Cal. App. 4th 445, 459-60 (3d
10 Dist. 1997)). Because plaintiffs’ “common count” claim appears
11 to seek the same relief and be based on the same facts as their
12 conversion claim, the court will decide their “common count”
13 claim together with their conversion claim.

14 Having addressed the facial validity of plaintiffs’
15 claims, the court next addresses whether plaintiffs’ claims
16 survive defendant’s affirmative defenses.

17 A. Immunity Under California Government Code Section 815

18 Defendant contends that plaintiffs’ claims are barred
19 under California Government Code section 815 (“section 815”)
20 because they are not statutory causes of action. (Def.’s Mem. at
21 4.) Section 815 states that “[e]xcept provided by statute . . .
22 [a] public entity is not liable for an injury, whether such
23 injury arises out of an act or omission of the public entity or a
24 public employee or any other person.” Cal. Gov’t Code § 815(a).

25 Plaintiff correctly notes, however, that section 815’s
26 bar on non-statutory claims does not apply to claims based on
27 contract. See Cal. Gov’t Code § 814 (noting that section 815
28 does not “affect[] liability based on contract”). “Whether an

1 action is based on contract or tort depends upon the nature of
2 the right sued upon, not the form of the pleading or relief
3 demanded." Util. Audit Co. v. City of Los Angeles, 112 Cal. App.
4 4th 950, 958 (2d Dist. 2003). An action "based on breach of
5 promise . . . is contractual." Id. An action "based on breach
6 of a noncontractual duty . . . is tortious." Id. "If unclear
7 the action will be considered based on contract rather than
8 tort." Id. (citing Roe v. State of California, 94 Cal. App. 4th
9 64, 113 (1st Dist. 2001)).

10 Though plaintiffs' sole operative cause of action is a
11 tort, see Moore v. Regents of Univ. of California, 51 Cal. 3d
12 120, 136 (1990) (referring to conversion as a "tort"), the right
13 sued upon in this case is contractual. The provision giving rise
14 to plaintiffs' claim for return of the security deposit is
15 Sacramento County Code section 5.50.702 ("section 5.50.702"),
16 which acts as a promise on defendant's part to return the deposit
17 to plaintiffs "[u]pon termination of the [their] franchise and
18 satisfaction of any damages . . . which may be due" to defendant.
19 (Sacramento Cnty. Code § 5.50.702.) Sacramento County Code
20 section 5.50.018 expressly refers to section 5.50.702 as a
21 "provision[] of . . . contract." (See Docket No. 25-1 Ex. 1,
22 Sacramento Cnty. Code § 5.50.018 ("All . . . provisions of
23 [franchise] contract[s] shall be deemed to be embodied in the
24 Franchise Documents"); Sacramento Cnty. Code § 5.50.012j
25 (defining "Franchise Documents" to include Sacramento County Code
26 section 5.50.702).) Thus, this action is based on contract, and
27 not subject to section 815's bar on non-statutory actions.

28 B. Statute of Limitations

1 Defendant next contends that plaintiffs' claims are
2 barred under California Code of Civil Procedure section 338
3 ("section 338"), (see Def.'s Mem. at 12), which imposes a three-
4 year limitations period on conversion claims, see Cal. Civ. Proc.
5 Code § 338(c)(1) (subjecting "action[s] for taking, detaining, or
6 injuring goods or chattels" to three-year limitations period);
7 AmerUS Life Ins. Co. v. Bank of Am., N.A., 143 Cal. App. 4th 631,
8 639 (2d Dist. 2006) ("[California] Code of Civil Procedure,
9 section 338, subdivision (c) . . . applies to the conversion of
10 personal property"). According to defendant, section
11 338's limitations period began to run in this case when
12 plaintiffs' franchise with defendant terminated in 2011, at which
13 time the security deposit became due to plaintiffs. (See Def.'s
14 Mem. at 12.) Because plaintiffs did not file this action until
15 June 2016, defendant contends, this action is barred under
16 section 338. (Id.)

17 Plaintiffs correctly note that under California law,
18 however, the limitations period on a conversion claim that arises
19 from an originally lawful taking "does not begin to run until the
20 return of the property has been demanded and refused or until a
21 repudiation of the owner's title is unequivocally brought to her
22 or his attention." Ramirez v. Tulare Cnty. District Attorney's
23 Office, No. F071223, 2017 WL 1007953, at *15 (5th Dist. Mar. 15,
24 2017) (quoting Coy v. Cnty. of Los Angeles, 235 Cal. App. 3d
25 1077, 1088 (2d Dist. 1991)). Here, it is undisputed that
26 defendant's receipt of \$250,000 from plaintiffs' predecessor was
27 originally lawful. (See Pls.' Mem. at 5; Def.'s Mem. at 12.)
28 Thus, section 338's limitations period did not begin to run in

1 this case until plaintiffs demanded and were refused the security
2 deposit or had unequivocal notice that defendant repudiated their
3 ownership of the security deposit.

4 The evidence before the court indicates that
5 plaintiffs' action is timely under both limitations triggering
6 tests. According to an affidavit submitted by plaintiffs,
7 plaintiffs did not demand the security deposit until November 10,
8 2014, and defendant did not repudiate their ownership of the
9 security deposit until March 2015, when it informed plaintiffs
10 that it would be transferring the security deposit to its general
11 account. (See Peling Decl. ¶¶ 4-5.) Defendant has not cited any
12 evidence indicating that a demand or repudiation took place prior
13 to November 2014. Because plaintiffs filed this action on June
14 8, 2016, the evidence before the court indicates that this action
15 is timely under section 338.

16 Defendant requests, as an alternative to judgment under
17 section 338, that the court continue disposition of its section
18 338 defense to allow it to conduct discovery regarding that
19 defense. (Def.'s Mem. at 13.) The Ninth Circuit has held that a
20 party requesting continuance of a summary judgment motion to
21 conduct discovery "must identify by affidavit the specific facts
22 that [the] discovery would reveal" and "explain why [such]
23 information . . . [is] essential to [that party's] opposition" to
24 the other party's motion. Tatum v. City & Cnty. of San
25 Francisco, 441 F.3d 1090, 1100 (9th Cir. 2006) (citing Fed. R.
26 Civ. P. 56(d)); see also State of Cal. v. Campbell, 138 F.3d 772,
27 779 (9th Cir. 1998) (same). Here, defendant represents that
28 discovery would reveal "whether [plaintiffs] made any demand for

1 return of [their] security deposit prior to November 2014,"
2 which, according to defendant, is essential to any opposition it
3 might raise to plaintiffs' position that this action is timely
4 under the limitations triggering tests they have cited. (See
5 Steiner Decl. ¶ 7.)

6 Putting aside the fact that there is already evidence
7 indicating that plaintiffs did not demand return of the security
8 deposit prior to November 2014, (see Peling Decl. ¶ 5), defendant
9 fails to explain why the information it seeks is essential to
10 showing that this action is untimely. The limitations triggering
11 test at issue in defendant's discovery request is demand of the
12 property in question and refusal of such demand. See Ramirez,
13 2017 WL 1007953, at *15. Because defendant can only refuse
14 plaintiffs' demand after they have made a demand, the date of
15 refusal is dispositive of whether plaintiffs demanded and
16 defendant refused to return the security deposit prior to June 8,
17 2013.³ Thus, the date on which plaintiffs first demanded return
18 of their security deposit is not essential to that inquiry.
19 Because the date of plaintiffs' first demand is not essential to
20 defendant's statute of limitations defense, the court will deny
21 defendant's request for continuance.

22 C. Right to Set-Off

23 Defendant focuses most of its Cross-Motion brief on its
24 set-off defense. That defense, as indicated in the fact section
25

26 ³ If defendant refused a demand prior to June 8, 2013,
27 this action is untimely. If defendant did not refuse a demand
28 prior to June 8, 2013, this action is timely (assuming defendant
also did not unequivocally repudiate plaintiffs' ownership of the
security deposit prior to that date).

1 of this Order, posits that defendant has a right to set off
2 plaintiffs' security deposit and its accrued interest against
3 \$334,610 in state franchise fees that plaintiffs allegedly
4 underpaid for the 2011 and 2012 calendar years.

5 California Code of Civil Procedure section 431.70
6 states that "[w]here cross-demands for money have existed between
7 persons at any point in time when neither demand was barred by
8 the statute of limitations, and an action is thereafter commenced
9 by one such person, the other person may assert in the answer the
10 defense of payment in that the two demands are compensated so far
11 as they equal each other" Cal. Civ. Proc. Code § 431.70.
12 This procedure, often referred to as a "set-off," is intended to
13 "eliminate[] a superfluous exchange of money between the
14 parties." Jess v. Herrmann, 26 Cal. 3d 131, 137 (1979).

15 "[A] defendant may . . . assert [a] setoff defensively
16 to defeat the plaintiff's claim in whole or in part," though it
17 "may not [use the setoff to] obtain an award of affirmative
18 relief against [the] plaintiff." Constr. Protective Servs., Inc.
19 v. TIG Specialty Ins. Co., 29 Cal. 4th 189, 198, (2002). In
20 determining whether to grant a set-off, the court may adjudicate
21 the merits of yet-to-be-adjudicated set-off claims. See, e.g.,
22 Unicom Sys., Inc. v. Farmers Grp., Inc., 405 F. App'x 152, 154
23 (9th Cir. 2010) (affirming lower court's adjudication of merits
24 of set-off claim).

25 Defendant asserts, and plaintiffs do not dispute, that
26 timely cross-demands for the security deposit and state franchise
27 fees in question existed concurrently after the state franchise
28 fees for the 2011 and 2012 calendar years became due. (See

1 Def.'s Mem. at 5.) Plaintiffs also do not dispute that they did
2 not pay the state franchise fees in question. (See Peling Decl.
3 ¶¶ 7-8.) They dispute only whether defendant may charge them
4 such fees.

5 The state franchise fees in question consist of fees
6 that plaintiffs allegedly underpaid for the 2011 and 2012
7 calendar years because they: (1) unilaterally deducted their CPUC
8 fees from their state franchise fees, and (2) failed to include
9 payments they collected from subscribers to pay PEG fees in their
10 gross revenues in calculating their state franchise fees.

11 1. Deduction of CPUC Fees

12 The parties' dispute with respect to plaintiffs'
13 deduction of CPUC fees centers over the interpretation of 47
14 U.S.C. § 542 ("section 542"), subdivision (b) of which states
15 that "[f]or any twelve-month period, the franchise fees paid by a
16 cable operator with respect to any cable system shall not exceed
17 5 percent of such cable operator's gross revenues derived in such
18 period from the operation of the cable system to provide cable
19 services." 47 U.S.C. § 542(b). Defendant argues that the CPUC
20 fee is not a "franchise fee" within the meaning of section
21 542(b), and thus does not count toward the five percent cap it
22 imposes. (Def.'s Mem. at 7.) Plaintiffs argue that the CPUC fee
23 is a "franchise fee" within the meaning of section 542(b), and
24 thus counts toward its five percent cap. (Pls.' Mem. at 7.)
25 Because the CPUC fee counts toward section 542(b)'s five percent
26 cap, according to plaintiffs, the five percent state franchise
27 fee they are obligated to pay defendant under DIVCA must be
28 reduced by the CPUC fee, pursuant to the principle of federal

1 preemption.

2 Section 542(g)(1) defines "franchise fee" to include
3 "any tax, fee, or assessment of any kind imposed by a franchising
4 authority or other governmental entity on a cable operator . . .
5 solely because of [its] status as such." 47 U.S.C. § 542(g)(1).
6 Section 542(g)(2) expressly excludes from its definition of
7 "franchise fee" "any tax, fee, or assessment of general
8 applicability (including any such tax, fee, or assessment imposed
9 on both utilities and cable operators or their services but not
10 including a tax, fee, or assessment which is unduly
11 discriminatory against cable operators)." Id. § 542(g)(2)(A).

12 The CPUC fee, codified in California Public Utilities
13 Code section 441 ("section 441"), applies not only to cable
14 operators, but to all "holders of a state franchise" that
15 authorizes the "operation of any network in the right-of-way
16 capable of providing video service to subscribers" ("video
17 franchise holders"). Cal. Pub. Util. Code §§ 441, 5830(f), (h);
18 see also Time Warner, 2013 WL 12126774, at *5 (noting that "it is
19 possible to qualify for [the CPUC] fee without being a cable
20 operator"). "[N]on-cable operat[ing] video [franchise holders
21 such] as Netflix, RedBox, and Blockbuster" may be subject to the
22 CPUC fee. Time Warner, 2013 WL 12126774, at *5.

23 In view of the applicability of the CPUC fee to non-
24 cable operating video franchise holders, it would not be proper
25 to conclude that the fee is imposed on cable operators "solely
26 because of their status as such." The CPUC fee is imposed on
27 cable operators because of their status as video franchise
28 holders, a status that is different from the status of being

1 cable operators. If a given cable company were to stop operating
2 cable, it would still be subject to the CPUC fee so long as it
3 holds a video franchise.

4 The applicability of the CPUC fee to non-cable
5 operators also supports finding that it is a "fee . . . of
6 general applicability" under section 542(g)(2). As noted above,
7 all entities that hold a video franchise, not merely cable
8 operators, are subject to the CPUC fee. The CPUC fee is not
9 unduly discriminatory towards cable operators because it does not
10 apply only to them. Thus, the court finds that the CPUC fee is a
11 fee "of general applicability" under section 542(g)(2).⁴

12 Because the CPUC fee is not imposed on cable companies
13 "solely because of their status as such," and because it is a
14 "fee . . . of general applicability," the CPUC fee is not a
15 "franchise fee" within the meaning of section 542.

16 The court's position on this issue accords with the
17 position of at least two other courts, which have also held fees
18 that are imposed on non-cable operating entities to be excluded

19 ⁴ At oral argument, plaintiffs argued at length that the
20 CPUC fee does not apply to utilities because CPUC charges a
21 separate fee to "electrical, gas, telephone, telegraph, water,
22 sewer system, and heat corporation[s] and every other public
23 utility." (See also Pls.' Reply at 9-10 (citing Cal. Pub. Util.
24 Code § 431) (Docket No. 25).) That a given entity is subject to
25 CPUC's utility fee, however, does not mean that it may not also
26 be subject to CPUC's video franchise fee. Section 441, by its
27 terms, imposes its fee on all holders of a video franchise; it
28 makes no exceptions for entities subject to other fees imposed by
CPUC. Moreover, even if the court were to find that the CPUC fee
does not apply to utilities, that would not preclude the CPUC fee
from being a fee of general applicability under section
542(g)(2). See 47 U.S.C. § 542 (merely stating that fees of
general applicability "includ[e] . . . fee[s] . . . imposed on
both utilities and cable operators").

1 from the definition of "franchise fees" under section 542. See
2 Zayo Grp., LLC v. Mayor & City Council of Baltimore, No. JFM-16-
3 592, 2016 WL 3448261 (D. Md. June 14, 2016) (holding that conduit
4 use fee that applies to "all users of the City's conduit system,"
5 not merely cable companies, is not "franchise fee" within the
6 meaning of section 542); City of Eugene v. Comcast of Oregon II,
7 Inc., 359 Or. 528, 558 (2016) (holding that license fee that
8 applies to all companies that "provide[] telecommunications
9 services over . . . public rights of way," not merely cable
10 companies, is not "franchise fee" within the meaning of section
11 542).

12 Plaintiffs cite Time Warner, 2013 WL 12126774, for the
13 contrary position. In Time Warner, the court noted that though
14 the CPUC fee applies to non-cable operators, section 542 "does
15 not require that a franchise fee be a fee assessed solely against
16 cable operators; [instead,] it requires that cable operators'
17 status as cable operators be the sole reason for assessment of a
18 franchise fee." Id. at *5. Noting that the defendant cable
19 company used its video franchise only to operate cable service,
20 the Time Warner court reasoned that if the company did not
21 operate cable service, it would not be a video franchisee, and
22 thus not be subject to the CPUC fee. See id. Based on that
23 reasoning, the Time Warner court concluded that the company's
24 status as a cable operator was the sole reason it was subject to
25 the CPUC fee. Id.

26 This court disagrees with Time Warner's analysis.
27 Assuming Time Warner's paraphrase of section 542 to be correct,
28 it still would not be the case that a cable company's status as a

1 cable operator is the sole reason it is subject to the CPUC fee.
2 As explained above, a cable company is subject to the CPUC fee
3 for the separate reason that it is a video franchise holder.
4 That a cable company uses its video franchise only to provide
5 cable service does not change the fact that it is a video
6 franchise holder, and thus subject to the CPUC fee for that
7 reason. It requires a leap of logic to conclude, as Time Warner
8 did, that entities that use their video franchise only to provide
9 cable service would not be video franchisees if they did not
10 provide cable service. Thus, in this court's view, Time Warner's
11 conclusion does not follow from its premises. Because Time
12 Warner is an unpublished district court decision, this court is
13 not bound to follow it. See People of Territory of Guam v. Yang,
14 800 F.2d 945, 949 (9th Cir. 1986) ("The law is clear that an
15 unpublished district court decision has no precedential
16 authority.").

17 For the reasons stated above, the court finds that the
18 CPUC fee is not a "franchise fee" within the meaning of section
19 542. Because the CPUC fee is not a "franchise fee" within the
20 meaning of section 542, plaintiffs were not entitled under
21 section 542 to deduct CPUC fees from their state franchise fees
22 for the 2011 and 2012 calendar years.

23 2. Failure to Include PEG Payments in Gross Revenues

24 The parties also dispute whether plaintiffs must
25 include payments they collect from subscribers to pay PEG fees in
26 their gross revenues for purposes of calculating their state
27 franchise fees. Their dispute centers over the interpretation of
28 California Public Utilities Code section 5860 ("section 5860").

1 Section 5860(d) defines "gross revenue" for purposes of
2 state franchise fees as:

3 [A]ll revenue actually received by the holder of a
4 state franchise, as determined in accordance with
5 generally accepted accounting principles, that is
6 derived from the operation of the holder's network to
7 provide cable or video service within the jurisdiction
8 of the local entity, including . . . [a]ll charges
9 billed to subscribers for any and all cable service or
video service provided by the holder of a state
franchise, including all revenue related to
programming provided to the subscriber, equipment
rentals, late fees, and insufficient fund fees.

10 Cal. Pub. Util. Code § 5860(d).

11 Section 5860(e), however, states that "the term 'gross
12 revenue' set forth in [section 5860(d)] does not include . . .
13 [a]mounts billed to, and collected from, subscribers to recover
14 any tax, fee, or surcharge imposed by any governmental entity on
15 the holder of a state franchise, including, but not limited to,
16 sales and use taxes, gross receipts taxes, excise taxes, utility
17 users taxes, public service taxes, communication taxes, and any
18 other fee not imposed by this section." Id. § 5860(e).

19 Plaintiffs argue that payments they collect from
20 subscribers to pay PEG fees fit squarely within the exception
21 stated in section 5860(e), and thus are not part of "gross
22 revenues" as defined in section 5860(d).

23 Plaintiffs' position appears to be correct. PEG fees,
24 which are allowed under California Public Utilities code section
25 5870 ("section 5870") and established pursuant to Sacramento
26 County Code, are charged by defendant to plaintiffs. (Peling
27 Decl. ¶ 8.) Plaintiffs, in turn, pass the fee on to their
28 subscribers, (id.), who pay the fee "as a separate line item on

1 [their] regular bill," Cal. Pub. Util. Code § 5870(o).
2 Plaintiffs then forward the PEG payments made by their
3 subscribers to defendant. (Peling Decl. ¶ 8.) This procedure is
4 expressly authorized and described in section 5870(o). Cal. Pub.
5 Util. Code § 5870(o). Because the payments plaintiffs collect
6 from their subscribers to pay PEG fees are "amounts billed to,
7 and collected from, subscribers to recover . . . [a] fee . . .
8 imposed by [a] governmental entity," they are not part of "gross
9 revenue[s]" as defined in section 5860(d).

10 Defendant contends that section 5860(e)'s exception
11 applies only to payments collected from subscribers to recover
12 "fee[s] not imposed by [section 5860]," and that PEG fees are
13 imposed pursuant to section 5860(c). (Def.'s Mem. at 9-10.)
14 Because PEG fees are imposed pursuant to section 5860, defendant
15 concludes, payments collected to recover them are "gross
16 revenues."

17 Both premises supporting this argument are flawed.
18 Section 5860(e) does not limit its exception to "fee[s] not
19 imposed by [section 5860]." It expressly states that its
20 exception "includ[es], but [is] not limited to . . . fee[s] not
21 imposed by [section 5860]." Cal. Pub. Util. Code § 5860(e).
22 Moreover, there is no indication that section 5860 imposes PEG
23 fees. Section 5860(c), which defendant cites for that assertion,
24 merely authorizes "local entit[ies] to impose utility user taxes
25 and other generally applicable taxes, fees, and charges under
26 other applicable provisions of state law." Id. § 5860(c).
27 Nowhere does it impose PEG fees. Thus, defendant's argument is
28 without merit.

1 Defendant also argues that plaintiffs were not
2 permitted, as a procedural matter, to unilaterally deduct PEG
3 payments collected from subscribers from their gross revenues in
4 calculating state franchise fees. City of Glendale v. Marcus
5 Cable Assocs., LLC, 231 Cal. App. 4th 1359 (2d Dist. 2014),
6 according to defendant, stands for the proposition that a cable
7 company may not unilaterally withhold disputed state franchise
8 fees from municipal authorities. (Def.'s Mem. at 10-11.)
9 Instead, the company must pay the fees to the authority, then
10 challenge whether the fees were proper in court. (Id.) Because
11 plaintiffs unilaterally deducted PEG payments from their gross
12 revenues in calculating state franchise fees for the 2011 and
13 2012 calendar years, defendant contends, defendant is entitled to
14 the state franchise fees plaintiffs would otherwise have paid for
15 those cycles under City of Glendale.

16 This argument is without merit as well. City of
17 Glendale was a case that affirmed a lower court's denial of a
18 cable company's request for a declaration stating that it may
19 withhold future PEG fee payments in order to offset past PEG fee
20 overpayments. See City of Glendale, 231 Cal. App. 4th at 1378.
21 City of Glendale was decided based on the court's conclusion that
22 such a declaration would, in effect, circumvent 47 U.S.C. §
23 555a's prohibition on award of damages against governmental
24 entities in cable regulation suits. See id. The case did not
25 decide the legality of unilaterally withholding disputed state
26 franchise fees. Thus, City of Glendale does not stand for the
27
28

1 proposition defendant cites it for.⁵

2 Because the payments plaintiffs collect from
3 subscribers to pay PEG fees are not part of "gross revenue[s]"
4 under section 5860, plaintiffs were entitled to withhold them
5 from their gross revenues when calculating state franchise fees
6 for the 2011 and 2012 calendar years.

7 For the reasons stated in this Order, the court finds
8 that plaintiffs have established a valid conversion claim for

9 ⁵ City of Glendale raises the question of whether this
10 action is barred under 47 U.S.C. § 555a ("section 555a").
11 Section 555a states that "[i]n any court proceeding . . .
12 involving any claim against a . . . governmental entity . . .
13 arising from the regulation of cable service . . . any relief . . .
14 . shall be limited to injunctive relief and declaratory relief."
15 47 U.S.C. § 555a. Here, plaintiffs are seeking return of a
16 security deposit plus interest. But defendant has already
17 transferred that money to its general account. (Peling Decl. ¶
18 4.) Thus, an argument can be made that this is a suit for
19 damages. See Edelman v. Jordan, 415 U.S. 651, 677 (1974)
20 (holding that "prospective injunctive relief . . . may not
21 include a retroactive award which requires the payment of funds
22 from the state treasury").

23 It is doubtful, however, that this action "aris[es]
24 from the regulation of cable service" under section 555a. The
25 parties' dispute is about defendant's failure to return a
26 security deposit. The court is not aware of a case that has held
27 or suggested that an action brought by a cable company to recover
28 a security deposit from a cable-regulating entity is one that
"aris[es] from the regulation of cable service" under section
555a. Cases that have applied section 555a appear to indicate
that section 555a was meant to bar claims arising directly out of
cable regulation, as opposed to claims that are only tangentially
related to cable regulation. Cf., e.g., Coplin v. Fairfield Pub.
Access Television Comm., 111 F.3d 1395, 1408 (8th Cir. 1997)
(applying section 555a to action brought by talk show producer
challenging city's decision to ban him from public access cable
channel based on content of his show); Jones Intercable of San
Diego, Inc. v. City of Chula Vista, 80 F.3d 320, 324 (9th Cir.
1996) (applying section 555a to action brought by cable operator
challenging city's requirement that it obtain a permit before
providing cable services). Accordingly, the court will not deny
plaintiffs' claims based on section 555a.

1 recovery of their security deposit plus its accrued interest, and
2 defendant has established a right to set off that amount by the
3 amount of CPUC fees plaintiffs deducted from their 2011 and 2012
4 state franchise fees. Accordingly, plaintiffs are entitled to
5 the security deposit, interest the deposit accrued prior to the
6 date it was transferred to defendant's account, and prejudgment
7 interest calculated at seven percent per annum⁶ the deposit
8 accrued from the date it was transferred to the date judgment is
9 entered in this case, less the CPUC fees plaintiffs deducted from
10 their state franchise fees for the 2011 and 2012 calendar years.
11 Because the parties have not offered the court a calculation of
12 what this sum is, the court will permit the parties to do so
13 before entering judgment on this Order.

14 IT IS THEREFORE ORDERED that plaintiffs' Motion for
15 summary judgment be, and the same hereby is, GRANTED IN PART and
16 DENIED IN PART, and that defendant's Cross-Motion for summary
17 judgment be, and the same hereby is, GRANTED IN PART and DENIED
18 IN PART, as follows:

- 19 (1) Plaintiffs are entitled to payment of the \$100,000
20 security deposit discussed in this Order, interest the
21 deposit accrued prior to the date it was transferred to
22 defendant's general account, and prejudgment interest
23 calculated at seven percent per annum the deposit
24 accrued from the date it was transferred to the date


25 ⁶ "The legal rate of interest on an obligation before the
26 entry of judgment is 7 percent, unless otherwise specified by
27 statute." Uzyel v. Kadisha, 188 Cal. App. 4th 866, 921 (2d Dist.
28 2010). The parties have not cited, and the court is not aware
of, a statute that requires a different interest rate in this
action.

1 judgment is entered in this case, less the fees imposed
2 pursuant to California Public Utilities Code section
3 441 that plaintiffs deducted from their state franchise
4 fees for the 2011 and 2012 calendar years.

5 (2) Plaintiffs' Motion and defendant's Cross-Motion are
6 DENIED in all other respects.

7 IT IS FURTHER ORDERED that within fourteen days of the
8 date this Order is signed, the parties shall submit a form of
9 Judgment consistent with this Order, setting forth the amount of
10 payment, if any, plaintiffs are entitled to under this Order.

11 Dated: April 5, 2017

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13 WILLIAM B. SHUBB
14 UNITED STATES DISTRICT JUDGE
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